



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

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ID #:	MP98063306
AGENCY:	10.6
Other:	AK
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SEP 12 1986

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RECEIVED

SEP 16 1986

CMPL SECTION

Re: Administrative Order on Consent
Martha C. Rose Chemicals, Inc.
Holden, Missouri

Gentlemen:

This is in response to your letters of August 26 and September 2, 1986, and our meeting of August 21, 1986, regarding the above-referenced site. I will first respond to your comments to the CERCLA Section 106 Administrative Order on Consent.

ARTICLE I.

A. Jurisdiction

1. The State of Missouri, through the Department of Natural Resources (MDNR), has been notified by telephone that EPA and the Rose Chemical Steering Committee are discussing the latter's undertaking of certain response actions at the site, and that if agreement is reached it will be memorialized in an Administrative Order on Consent. EPA has not yet sent MDNR a draft of the above-referenced Order and will not do so until EPA and the Steering Committee has reached agreement on its terms. As you are aware, the statutory provisions of Section 106 of CERCLA require notification to the State.

2. We believe that the facts as stated in the Order could be proved if this matter was contested. However, EPA would accept modification of certain findings of fact as follows:



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SUPERFUND RECORDS

(a) Paragraph 8. Add a second sentence stating, "EPA believes the aforementioned contamination resulted from releases of PCBs from the Holden facility."

(b) Paragraph 11. Place a period after "conditions" and add new phrase, "EPA estimates of PCBs and PCB items on site include . . ."

(c) Paragraph 12. Begin each sentence with, "EPA believes . . ."

(d) Paragraph 17. Begin the finding with, "EPA believes . . ."

EPA disagrees with your statement that, "It is inappropriate and unfair to require the PRPs to agree to acknowledge legal liability." While recognizing the PRP's voluntary efforts in forming the Steering Committee to look into the environmental problems at the site, the fact remains that the generators of PCBs and PCB items that were shipped to the Holden facility are responsible, under the Toxic Substances Control Act (TSCA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for the proper disposal of such materials. Your reference to EPA's lack of authority to issue Section 104 voluntary consent orders is not correct, as Section 104 of CERCLA primarily concerns the government's authorities to take response actions. We do not agree that admitting specific findings of fact and law (as revised above) will increase the PRPs' liability to third parties. EPA would accept the language, "The Generator Respondents neither admit nor deny EPA's findings as stated in this paragraph," in Article II.8 and 12 and Article III.4. The PRPs' (3% of the total number of PRPs) concerns over acknowledging liability in this matter should not affect future contribution actions against reluctant generators for recovery of expenses. Perhaps we should discuss the specific concerns of the PRPs, including the legal ambiguities with respect to contribution and how recovery of the PRPs' cleanup expenses would be jeopardized. The EPA continues to believe the members of the Steering Committee should admit the findings of fact and law, with the exceptions previously noted. Liability on the part of generators is not disputed in this matter and, because it appears presently that only one substance (PCBs) is the cause of concern, contribution issues should not be as difficult to address as other sites with multiple contaminants.

B. Statement of Purpose

1. If in fact PCBs are the only hazardous substances that are located at the Holden facility, then EPA would expect the PRPs to acknowledge liability only for PCBs and PCB items at the site. This would include PCBs that have been mixed or combined with other hazardous substances, contaminants or pollutants and also include all PCB-contamination caused by Rose, Inc.'s activities. If additional non-PCB hazardous substances are discovered and are contributing to the endangerment at the site, CERCLA's concept of joint and several liability, as it has been interpreted by the courts, would hold the PRPs responsible for such additional materials if the harm is indivisible. If the harm is divisible, it would be the PRPs' burden to establish such divisibility and to identify the source of such non-PCB materials. Accordingly, we will need to include a statement (perhaps in the Statement of Purpose) that, "If review of available information or discovery of additional information indicates that any entity sent wholly non-PCB hazardous substances to the Holden facility or if wholly non-PCB hazardous substances are discovered at the site, additional or expanded response actions may be required with respect to said hazardous substances in this or other Orders."

2. The comment requesting deletion of all "near the site" language is appropriate, but not for the reasons stated in your letter. It is EPA's understanding that the PRPs will be conducting certain response actions under this Order on Consent, including sampling of the creek adjacent to the Holden facility and proper disposal of PCB-contaminated sludge at the Holden city treatment plant. The "site," for purposes of response under CERCLA, includes the Holden facility and all areas or properties where PCB contaminated items, soils or sludges are located. Accordingly, Article II.1. will be revised to make this fact clearer. We do not believe that access to private property to conduct the required response actions will be a problem. The city has indicated its desire that the PRPs remove the contaminated sludge. Your reference to the Outboard Marine Corp. v. Thomas case, as striking down EPA's CERCLA authority to inspect and obtain samples, is overbroad and not entirely true. That case, which is on appeal, denied EPA access where government response activities constituted a taking in a manner that interfered with a landowner's enjoyment and use of his property. In any case, any site access that could not be reasonably obtained by the Generator Respondents would be a delay subject to the Force Majeure provisions of the Order.

EPA will not delete the last sentence in Article I.B. This sentence, or something similar, is needed in the Order so it is clear that the response actions undertaken by the PRPs pursuant to the Order on Consent will not eliminate the imminent and substantial endangerment that the Regional Administrator has determined exists.

ARTICLE II - FINDINGS OF FACT

1. Agreed.

2. Agreed, except that the Order must preface the requested language addition at the end of the statement with, "The Generator Respondents assert that Rose, Inc. was also in violation of its contractual obligation to the Generator Respondents for failing to properly manage . . . items." This is necessary because EPA has not evaluated such contractual obligations between the PRPs and Rose, Inc., and therefore is not in a position to agree a violation of the agreements exist. In any case, I do not believe it is appropriate for EPA to make a determination as to whether or not a contractual relationship between two private parties has been violated.

3. Agreed, except that the Order must preface the requested language addition with, "The Generator Respondents state that . . . regulation." EPA presently does not have information on whether the PRPs knew or did not know of the EPA citations of Rose.

EPA revocation of the TSCA approvals to process PCB capacitors and transformers for disposal were not solely based on the TSCA violations, therefore it would not be appropriate to include the requested statement.

4. Finding of fact #8, as modified by my previous suggestion, will remain in the Order. Under the subject Order, the PRPs will be sampling the branch adjacent to the Holden facility and will be taking specific actions with respect to the city's sludge drying beds.

5. Your comment #5 misstates historical fact. EPA has not taken specific actions to close Rose, Inc.'s operations even though it appears the company was in continuous violation of TSCA requirements for a number of years. EPA entered into two separate administrative consent orders under TSCA whereby Rose, Inc. agreed to comply with the regulations. Unfortunately, the company was never able to fully comply. I agree that

paragraph 10 can be revised to state the approvals have been revoked and that Rose has abandoned its facility. Additionally, I will revise our Order to include a finding relative to the previous §106 Order to Rose, Inc., et al. and their refusal to comply with the provisions therein.

6. Previously, I suggested rewording paragraphs 11 and 12 of the findings of fact to change them to specific EPA allegations. The quantities referred to in paragraph 11 are only estimates and are referred to as such. As to paragraph 12, please see previous comments. The initial sampling to be conducted by the PRPs and which began on September 3 should provide more information which can be included in paragraph 12.

7. EPA recognizes the present limitations on the PRPs' access to the site and will discuss appropriate language to be inserted into paragraph 16. Again, inability to comply with the terms of the Order on Consent, because of denial of access to the site or inability to remove certain materials based on legal impediments, could evoke the Force Majeure provisions of the Order. I would also like to clarify a point relative to your assertion that EPA has refused to issue a site access order. While at this time EPA believes it is not a necessity, issuance of an order for access or other legal actions may be considered at a later date if circumstances warrant such a consideration.

8. EPA will consider inclusion of a finding of fact relative to OSHA's findings.

ARTICLE III - CONCLUSIONS OF LAW

1 (and 2). I have commented on your proposed changes infra, and do not believe the language in the Order should be changed.

ARTICLE IV - DETERMINATIONS

1. In 1.(a) the wording will be changed to, ". . . the actual release of PCBs and the threat of further releases of PCBs and/or other hazardous substances . . ." This is necessary because of the non-PCB substances remaining onsite which the PRPs have agreed to dispose of. Paragraph 1(b) will be revised to ". . . release of PCBs and/or other hazardous substances.

ARTICLE V - ORDER

1. EPA cannot commit itself to review any submission by the PRPs that requires EPA's approval within any particular

time frame. However, I would agree to language that requires EPA to review submissions and to respond in writing in an expeditious manner.

ARTICLE VI - PROCEDURAL AND LEGAL PROVISIONS

A. Authorized Representatives

1. The proposed change is agreed to. However, your statement that a situation may arise whereby the "Executive" would act on behalf of only a limited number of PRPs is not acceptable. In this and future Orders, EPA expects to deal with one person who makes decisions on behalf of the steering committee, although EPA realizes decisions will be made by the Executive after consulting with the members of the committee.

B. Records

1. In item no. 1, EPA agrees to delete the phrase, "and other information," that appears in the second and third line. However, I will add a new paragraph to Article VI.B which will state that nothing contained therein should be interpreted or viewed as preventing EPA from requesting additional information pursuant to law.

As to the second sentence, EPA agrees to delete the phrase starting with the last line on page 12, "all information and records . . . or the Site and." EPA still will require transaction records relating to Rose, Inc., et al.

2. I believe it is better to retain the "upon request" language. EPA will ordinarily provide the subject information.

C. Access to the Site

1. We will include language in Article VI.C recognizing that the Respondents may not have unqualified legal authority to enter and conduct certain response actions at the site and may not have legal authority to remove materials. However, EPA expects the Respondents to use all reasonable measures to secure necessary access and authority to remove substances and to provide such access to EPA as the Respondents have legal authority to grant. I suggest you provide specific language to be put into the Order consistent with this comment.

F. Other Applicable Laws

1. Agreed to.

G. Record Preservation

1. Agreed to.

H. Resolution of Disputes

1. Article VI.H.2 will be deleted, but will be replaced by, "If agreement concerning the disputed submittal, plan, report or schedule, or any part, refinement or revision thereof cannot be achieved by means of the procedures set out above, EPA shall provide written notification to the Respondents that such agreement has not and cannot be achieved and that EPA considers the resolution of disputes process as provided for herein to be at an end."

I. Force Majeure

1. The present wording of the Force Majeure provision is clearly broad enough to include delays or impossibility of performance caused by legal impediments to site access and removal. EPA is prepared to specifically recognize that possibility in the Order. However, EPA does wish to retain the ability to review the circumstances when the problems arise to ensure the PRPs have taken all reasonable measures to overcome the obstacles. Therefore, the Order will not provide for a declaration before the fact that the burden of proof has been met.

J. Subsequent Modification or Amendment

1. While the Statement of Work (SOW), and the site activities that will be undertaken thereto, do in fact concern only initial activities that are of immediate concern, Section 106 of CERCLA is not, contrary to your interpretation, used by EPA for exclusively "emergency" situations. Section 106 of CERCLA can be used by EPA in instances where the appropriate government official has determined that a release or threat of a release of hazardous substances presents or may present an imminent and substantial endangerment to public health or welfare or the environment. The endangerment that exists or could exist at or near the Holden facility will continue until final clean-up is completed. The PRPs and EPA may enter into discussions on further activities at the site. If

an agreement is reached, it may be memorialized in an amendment to the subject Order on Consent or in a different Order. The provision you object to merely keeps our options open. Separate Order(s) may indeed be negotiated for future discrete response actions depending upon the circumstances at the time. Your concern with liability for "PCBs" rather than "hazardous substances" in general has previously been addressed. No language changes need to be addressed in this paragraph of the Order.

K. Reservation of Rights

1. Agreed, except that the clause should be, ". . . any enforcement action against the Respondents and any or all other responsible parties"

L. Other Claims

1. While at the present time EPA agrees that the subject Order on Consent does not require the PRPs to address substances other than PCBs or PCB contaminated materials, it is nevertheless correct that EPA will not release any party from any potential liability with respect to PCBs and any hazardous substance at the site. This paragraph cannot to be revised.

2. EPA will exercise its enforcement discretion and not seek penalties against the PRPs for violations of the PCB regulation's one-year disposal deadline, as long as this and future Orders are complied with and clean-up of the site proceeds in an orderly and timely manner.

M. Termination and Satisfaction

1. It is agreed that any PCB clean-up that EPA requires in the subject Order will not be inconsistent with nationally applicable U.S. EPA criteria that is applicable at the time decisions are made.

In response to your letter of September 2, 1986, I have the following comments.

1. For all activities that the PRPs agreed to immediately undertake at the site, I would appreciate a weekly update, to be submitted COB each Friday, detailing the specific activities that have been undertaken during the week and the projected activities for the following week.

2. Removal of Certain Non-PCB Materials

EPA requested the removal of all drums/containers of sodium, some of which may be partially full or empty. My understanding of Mr. Stonitsch's position is that he has been appointed and therefore technically can act as trustee and make decisions in that capacity, until he refuses the appointment. Such decisions can include authorization to the PRPs to remove non-PCB materials.

With respect to the RCRA permitting requirements, I believe the trustee should be the person to obtain the proper generator I.D. number. Rose, Inc. presently has a federal transporter I.D. (MOD 980633069). Since the RCRA permitting program has been delegated to the State of Missouri, the Trustee should submit the proper notification form(s) to MDNR. Hopefully, I will have more specific information for you on Friday.

3. Liquid PCBs

During our meeting on August 21, 1986, EPA requested that the members of the Steering Committee adequately secure and contain liquid PCBs in all bulk storage tanks, both internal and external. Proper containment, as I indicated, includes secondary containment for all bulk storage tanks.

4. SOW

During the August 21 meeting, I believe I stated that the SOW, in general and in concept, was satisfactory as a basis for inclusion in the Order. EPA looks forward to reviewing a revised SOW.

There are a few other issues which need to be discussed.

1. Sludge disposal. During our August 21 meeting, the PRPs inquired as to the position EPA would take with respect to proper disposal of PCB contaminated sludge that exists at the Holden city treatment plant. Because the specific concentration source of PCBs is not known and cannot be reasonably determined, EPA will require disposal of sludge, subsequent to drying and filtration, in an approved PCB chemical waste landfill. Water from the drying and filtration process must comply with the State of Missouri's NPDES requirements prior to discharge.

2. Off-Site PCB Contaminated Items. As I indicated during the August 21 meeting, Rose, Inc. and/or American Steel Works, Inc. removed certain equipment and items from the Holden facility. Some of the items were stored on private individual's properties in Holden and some may have been taken to Rose, Inc.'s, et al. offices in Kansas City. Analytical results from samples taken of certain items on the properties in Holden indicated significant PCB contamination. EPA intends to have all PCB contaminated equipment and items returned to the Holden facility, but will not require the Generator Respondents to transport the items. However, the PRPs should make a decision to where the materials should be stored at the facility. The EPA intends to place most materials in the American Steel Works, Inc. portion of the facility. Storage will have to be in compliance with the TSCA requirements which include appropriate curbing. By this letter, EPA is giving the members of the Steering Committee an opportunity to have input with respect to placement of the curbing and actual construction if they desire. The removal of the PCB items may begin as soon as September 12.

3. Parties

Please provide me with the names and addresses of each Generator Respondent that will be a participant to this Order. I will also need the names and titles of each individual signing the document.

4. Routes of Exposure

As indicated by my letter of August 19, the following is the proposed revision to Article II.14.

" . . . exposure, PCBs may be chronic toxicant to humans via oral and dermal exposure, a carcinogen, and a suspected mutagen and teratogen. PCBs may cause harmful effects to vegetation and animal life. The continued presence of PCBs and PCB items and PCB contaminated material at and near the Holden facility may result in an imminent and substantial endangerment to the public health or welfare or the environment through direct contact, air transport of PCB contaminated dust, surface water contamination (i.e., suspended sediment) of Pine Oak Creek resulting from precipitation runoff from contaminated areas at the facility."

I look forward to discussing this letter with you and stress that EPA and the PRPs must move forward in an expeditious manner to resolve this matter. To bring this matter to a conclusion, I have been directed to inform you that EPA will expect to resolve the Administrative Order by close of business September 19, 1986, and that we will be available to meet with you before then to discuss the terms. Failure to meet that deadline will require us to reevaluate the need for an immediate removal action and other legal options.

Sincerely,



J. Scott Pemberton
Assistant Regional Counsel

cc: Daniel Bukovac
James G. Trimble
F. Henry Habicht, DOJ
(ATTN: Sheila Green)